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No. .....

IN THE

Supreme Court of the United States

October Term 1982

GOLDEN RAIN FOUNDATION OF LAGUNA HILLS,

Appellant,

vs.

LAGUNA PUBLISHING COMPANY,

Appellee.

On Appeal From the Court of Appeal of the State of California.

JURISDICTIONAL STATEMENT.

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Questions Presented.

Rossmoor Leisure World is a private, limited-access residential community designed to provide those who invest in homes quiet, safe seclusion in their retirement years. No commercial activity—not even a grocery store—may be established within the walls of the retirement village, and no individual may enter the community except by the invitation of a resident.

The questions presented are:

1. Whether article I, section 2 of the California Constitution is violative of the Fifth and Fourteenth Amendments of the United States Constitution when interpreted and applied to prohibit owners of private residential property, from which the general public is rigorously excluded, from determining who shall be permitted to enter upon their property for the purpose of engaging in commercial speech.

2. Whether article I, section 2 of the California Constitution when interpreted and applied to prohibit owners of private residential property, from which the general public is rigorously excluded, from determining who shall be permitted to enter upon their property for the purpose of engaging in commercial speech constitutes a taking of property without just compensation in violation of the Fourteenth Amendment of the United States Constitution.

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JURISDICTIONAL STATEMENT.

Opinions Below.

The decision from which this appeal is taken was issued by the Fourth Appellate District, Second Division of the California Court of Appeal on the second rehearing of this matter and is reported at 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982) (Appendix A). The opinions on the initial hearing and first rehearing by the Court of Appeal are reported at 110 Cal. App. 3d 43, 167 Cal. Rptr. 687 (1980) (Appendix B), and 124 Cal. App. 3d 967, 177 Cal. Rptr. 703 (1981) (Appendix C), respectively. The trial court's findings of fact and conclusions of law are attached hereto as Appendix D. The denial of appellant's petition for rehearing in the Court of Appeal (Appendix F) and the denial of appellant's petition for hearing by the California Supreme Court are unreported.

Jurisdiction.

The decision of the California Court of Appeal upon second rehearing was filed on May 18, 1982, and, on June 16, 1982, the California Court of Appeal denied appellant's petition for a third rehearing. On August 18, 1982, the Supreme Court of the State of California likewise denied appellant's petition for hearing, and the decision of the Court of Appeal thereby became final. A notice of appeal to this Court was filed in the California Court of Appeal, Fourth Appellate District, Second Division on October 18, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2) (appeal lies when a state statute is upheld against a claim that it is repugnant to the federal Constitution). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 79-80 (1980).[1] A state constitutional provision is a state "statute" for purposes of this Court's appellate jurisdiction under that section. *Id.* at 79.

The appeal is being docketed in this Court within the time provided by the Order of this Court dated November 9, 1982 (Rehnquist, J.).

Constitutional and Statutory Provisions Involved.

United States Constitution, article VI, clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

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[1]While appellant is confident this case is properly before this Court under 28 U.S.C. § 1257(2), if the Court should conclude that this case is not within its appellate jurisdiction, appellant requests that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103. Jurisdiction would then be under 28 U.S.C. § 1257(3).

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

United States Constitution, amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment XIV, section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

California Constitution, article I, section 2(a)

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Statement of the Case.

Rossmoor Leisure World is a private, residential, retirement compound which includes dwellings, recreational facilities for the residents, and streets. There are no stores, shopping centers, office buildings or similar facilities within Leisure World. (C.T., 91.) A primary attraction for those purchasing residences in Leisure World is the promise of security and seclusion. Through the use of high walls, gates and private security guards, the general public is and since its inception in 1964 has been rigorously excluded from the confines of Leisure World. Visitors are permitted entry only upon the specific invitation of a resident. (C.T., 91.)

Appellant Golden Rain Foundation of Laguna Hills ("Golden Rain") is a private non-profit corporation which was formed as a vehicle through which the owners of property in Leisure World would and do promote and administer the common goals of the community.[2] Thus, while the dwellings within Leisure World are individually owned by the residents,[3] certain of the common areas, including the main streets, clubhouses, and recreational facilities are held in trust by Golden Rain for the benefit of the individual resident property owners.[4] (C.T., 90.) Most of the services Golden Rain is chartered to provide for the benefit of the residents are accomplished through a contract with a professional management company.

Every property owner in Leisure World is either directly or indirectly a voting member of Golden Rain and pays dues to finance the management and administration of the common objectives and property of the group.[5]

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[2]Golden Rain's primary purpose is stated to be developing "a community . . . for senior citizens; and to provide services and community facilities to the occupants of the community . . . ." To accomplish this goal, Golden Rain's corporate charter endows it with broad corporate powers enabling it to engage in "any business or activity . . . permitted under the [California] General Non-Profit Corporation Law" and "[t]o make contracts, and to do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of this corporation." (R.T., 2904; Exhibits I, J.) Golden Rain is vested with the authority to make managerial decisions, including establishing rules for the use of the common areas and contracting for services.

[3]Approximately half of the units are owned outright as condominiums. The other half are held by the residents through ownership of shares of stock in cooperative housing.

[4]Other common areas are held by the Mutuals. Before one may own property in Leisure World, he must be admitted as a member of one of a number of resident property owner associations known as "Mutuals."

[5]By virtue of membership in a Mutual one automatically becomes a member of Golden Rain. Because some of the occupants of the residences, such as spouses and siblings, are not required to join, the voting membership in Golden Rain is less than the total residents within Leisure World; yet all property units are represented.

For several years prior to 1972, Golden Rain had a contract for management services with a management company known as Leisure World Foundation ("LWF"). One of the many responsibilities entrusted to LWF was the publication and distribution of a weekly newspaper styled as the *Leisure World News*, which was primarily devoted to news items of peculiar interest to the residents of Leisure World such as announcements concerning anniversaries, Leisure World clubs, Mutuals, and internal social activities. In addition, it provided a vehicle for communication between management and the residents pertaining to the administration of the common facilities and also contained advertising which helped defray expenses. Beginning in 1972, with the approval of Golden Rain, the responsibility for the publication and distribution of the *Leisure World News* was shifted to a new entity formed by former employees of LWF called the Golden West Publishing Company; however, the general character of the newspaper remained the same. The *Leisure World News* is not now, nor has it ever been, a newspaper of general circulation. It has always been distributed primarily[6] to, and physically delivered by the residents of Leisure World. (R.T., 635.)

Appellee Laguna Publishing Company was the publisher of a "give-away newspaper" of general circulation devoted primarily to commercial advertising entitled the *Laguna News-Post*. In 1967 and again in 1973, appellee sought permission from Golden Rain to enter the confines of Leisure World and distribute its paper by carrier on an unsolicited basis to the residents of Leisure World. Appellee was advised by the elected board of Golden Rain that it could

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[6]Copies were sometimes mailed to requesting non-resident owners and were made available to prospective owners at the Leisure World sales office.

enter the confines of Leisure World and distribute its papers, but only upon the same terms and conditions as other papers of general circulation: namely, on a subscription basis with individual residents. (R.T., 192, 3191; C.T., 946-47.) Permission for general access for the purpose of unsolicited distribution was denied. Appellee brought suit alleging, *inter alia*, that the denial of general access to the confines of Leisure World while continuing to permit and sponsor the publication and distribution of the *Leisure World News* violated appellee's federal and state constitutional rights of free speech and press.[7] Appellee sought both damages and equitable relief.

Prior to trial, the court entered an order determining the following facts to be without substantial controversy:

1. Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance, and other facilities.

2. All of the real property within Leisure World is privately owned and is used only for private purposes.

3. Leisure World is not open to the general public.

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[7]The Complaint also alleged that defendants had conspired to restrain trade in violation of the Cartwright Act, *Cal. Bus. & Prof. Code* §§ 16600-16758, and the Unfair Practices Act, *Cal. Bus. & Prof. Code* §§ 17000-17101, as well as violations of appellee's civil rights under 28 U.S.C. § 1983. The trial court ruled against appellee on the § 1983 claim, and the jury found against appellee on the Cartwright Act and Unfair Practices Act claims. (Appendix D at 138-39.) The California Court of Appeal upheld the rejection of appellee's § 1983 claim inasmuch as no federal constitutional violation had been proven. While the appellate court initially upheld the jury's verdict on the Cartwright Act and Unfair Practices Act claims (Appendix B at 79), on second rehearing it reversed its previous position and decided that appellee was entitled to a new trial on its claim under the Cartwright Act for conspiracy to restrain trade solely on the theory that the "unconstitutional" exclusion of appellee from Leisure World the result of a conspiracy between Golden Rain and Golden West Publishing Company. (Appendix A at 46-49.) Appellee's Cartwright Act claim is thus totally dependent upon the California court's holding on the constitutional issue.

4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.

6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis.

(Appendix E at 140.)

Following a four-month trial, the jury rendered a unanimous verdict for the defense on the damage claims, and the court denied injunctive relief, holding that the Laguna Publishing Company had no federal or state constitutional right of free speech which would mandate granting it general access to Leisure World. (*See* Appendix D at 138.) The Laguna Publishing Company appealed, contending that the trial court had erred in holding that it had no federal or state constitutional right unilaterally to distribute its paper within the confines of Leisure World.

The California Court of Appeal affirmed the trial court's rejection of appellee's federal constitutional claims but, in an unprecedented and sweeping decision, reversed the trial court's holding on *state* constitutional grounds. The court interpreted the California Constitution, article I, section 2, as creating a state right of free speech and press far broader than that provided by the federal Constitution. This state

right, the court held, included a right of "equal access." The court stated:

> To the extent that the owners of a private, gated community admit a representative of a given category of activity for purposes of exercising the constitutional right of free speech, then others of that same category cannot be excluded from the exercise of that same right. . . . Golden Rain must yield to application of the rule recited, and it must admit all others similarly situated who wish to deliver their newspapers unsolicited to each residence in Leisure World.

(Appendix B at 75-76; C.T., 938.)

The California court twice granted petitions for rehearing. Each time, the California court maintained its position that Golden Rain had violated appellee's state constitutional rights by "discriminatorily" excluding appellee from Leisure World. The California court rejected Golden Rain's assertion that its federal constitutional property rights, both directly and in its representative capacity, entitled it to determine whether and upon what terms to admit to Leisure World a wholly commercial publication with no relationship to the community.

The California court expressly upheld the trial court's finding that Leisure World is not the "functional equivalent of a municipality" but is private property, to which the general public is rigorously denied entry.[8] It acknowledged

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[8]The California court stated: "[P]laintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech, discrimination issue. There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred." (Appendix A at 23.) The court found it significant, however, that the residents sometimes permitted a plumber, electrician, or other repairman to enter the premises. From this, the court concluded that Golden Rain's assertion of its privacy interests was a "needless and exaggerated insistence upon private property rights." (Appendix A at 27.)

that Golden Rain had the right to exclude from Leisure World *all* newspapers, including that of appellee. Golden Rain's transgression, as identified by the California court, was that it selected and subscribed to the *Leisure World News* and arranged to have that paper distributed on its own admittedly private property to the residents of the community which it was chartered to manage. This, the court held, constituted impermissible discrimination and violation of appellee's rights of free speech and press under article I, section 2 of the California Constitution. The California court held that, for so long as Golden Rain permitted the delivery of the *Leisure World News* to the residents absent each resident individually and separately subscribing to it, Golden Rain must allow appellee to make unsolicited delivery to the same residents.[9] (Appendix A at 33.) In response to Golden Rain's contention that the court's holding resulted in a taking of its property without compensation, the California court stated that "no imposition of substance" would result. In reaching its decision, the California court erroneously relied on this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The Questions Are Substantial.

This case presents two important questions not previously addressed by the Court concerning the extent to which state-created rights may be allowed to impinge on freedoms guar-

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[9]The California court inexplicably rejected the trial court's finding No. 5 that Golden Rain had authority to speak for the residents in arranging for the distribution of the *Leisure World News*. The conclusion of the California court is directly contrary to the undisputed evidence in the record. (*See* notes 2, 4 & 5, *supra*.) The California court characterized the written agreement by which Golden Rain subscribed to the *Leisure World News* on behalf of the residents as a "cosmetic subterfuge" and "meaningless." The court stated that it had reached that conclusion because Golden Rain's corporate articles and by-laws did not specify that it had the right to enter into such a subscription agreement. (Appendix A at 15 & 33 n. 11.)

anteed by the United States Constitution. The issues raised by this appeal are (i) whether a state constitutionally may prohibit the owner of private, noncommercial property not open to the public from choosing whom it will allow to enter upon the property to engage in commercial speech, and (ii) if a state may prohibit such selection by the property owner, whether such prohibition is tantamount to a taking of property without payment of just compensation.

1. A State May Not Constitutionally Prohibit the Owner of Private, Noncommercial Property Not Open to the Public From Choosing Whom It Will Allow to Enter Upon the Property to Engage in Commercial Speech.

The Court has recognized that the right to exclude others is one of the most essential sticks in the bundle of rights that is commonly characterized as property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). The decision of the California court has deprived the residents of Leisure World of this core *federal* constitutional right. In so doing, it has elevated a novel and expansive interpretation of a state constitutional right to unabridged commercial speech to a position far superior to the federal constitutional right of a residential property owner to exclude a stranger.

Such a result is without precedent and, indeed, is contrary to the previous holdings of the Court that have upheld as paramount the right of the owner to regulate the use of his private property. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court invalidated a municipal ordinance prohibiting door-to-door solicitation. The Court stated that the decision of whom to admit or exclude, as well as whose literature would be received, properly rested in the exclusive province of the property owner. *Id.* at 148. In contrast to the municipal ordinance at issue in *Martin*, the decision not

to allow uninvited members of the general public access to Leisure World was made by the homeowners through Golden Rain.

The right of the homeowner to reject commercial advertising was acknowledged in *Rowan v. Post Office Department*, 397 U.S. 728 (1970), where the Court upheld a statute providing that a property owner could selectively prohibit an advertiser from mailing literature to his home. Noting that "[t]he Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property" (*id.* at 737), the Court rejected the advertisers' claims that their constitutional right to communicate had been invaded by the statute. Chief Justice Burger, writing for a unanimous Court, stated:

> We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient . . . . *The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.*

Id. at 738. (Emphasis supplied.) The Court thus rejected a claim virtually identical to that advanced by appellee here, holding that the rights of the owner of private property are not to be subordinated to the free-speech claims of commercial advertisers.[10]

In this case, the California court erroneously relied upon *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where the Court held that the State of California was free

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[10]In fact, appellee's claim here is even less persuasive than the claim advanced in *Rowan*, for appellee is a mere conduit for commercial speech and seeks special general access directly to private property as opposed to use of the United States mail.

to create a state constitutional right of free speech which was broader than the First Amendment right so long as the restrictions created by the state right did not amount to an uncompensated taking or contravene other federal constitutional guarantees. *Id.* at 81. In *PruneYard*, the Court affirmed the holding of the California Supreme Court that the owner of a commercial shopping center to which the public was permitted free access could not curtail the rights of political speech and petitioning of persons coming onto his property. In this case, the California court stated that it was "merely extending" the *PruneYard* holding. *PruneYard*, however, provides no support for the dramatic extension made. As Justice Powell emphasized in his concurring opinion in which Justice White joined, "[s]ignificantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." *Id.* at 96 (Powell, J., concurring).

The holding of the California court in this case goes well beyond permitting political speech in freestanding stores and commercial establishments open to the public; it prohibits the owner of private, noncommercial property from determining who among a host of commercial vendors shall be given access to private property to distribute advertising pamphlets and upon what terms.[11] Such access to the private refuge certainly is not "crucial to the exercise of rights of

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[11]The implications of the California court's holding are staggering. Despite the California court's protestations to the contrary, the all-or-nothing rule advocated would establish an equal time-equal access rule of monumental proportion. Any apartment complex, convalescent home, convent, or private club inviting someone to make a presentation would be required to give a similar opportunity to every other person desiring, for whatever reason, to make his own presentation. By the act of inviting in a single speaker, the property owner would have converted its property into a public or semi-public forum.

free expression." *Id.* at 91 (Marshall, J., concurring). Unlike the shopping center involved in *PruneYard*, the property herein involved is a residential development whose *raison d'etre* is the exclusion of the uninvited general public for reasons of both privacy and security. This is not a case where appellant has excluded from its property the members of a "suspect class" (*cf. Shelley v. Kraemer*, 334 U.S. 1 (1948)); nor is it a case where a municipality — or the "functional equivalent" thereof (*Marsh v. Alabama*, 326 U.S. 501 (1946)) — has denied someone the right to petition the government for redress of his grievances. Appellee was merely a conduit for commercial advertising seeking, unilaterally and solely out of pecuniary motives, to impose its presence upon a group of private property owners banded together in pursuit of privacy. The California court's ruling substantially impinges upon the privacy rights of Golden Rain and its members, the property owners in Leisure World. Appellee's purported *state* constitutional "right" to distribute "throw-away" advertising literature on plaintiff's property cannot override the *federal* constitutional right of a property owner to determine who will be permitted entry to its property and who shall not.

2. If a State May Prohibit Such Selection by the Property Owner, Such Prohibition Is Tantamount to a Taking of Property Without Payment of Just Compensation.

As noted above, the Court held in *PruneYard* that the state could create an expansive free-speech right only if the expanded right neither amounted to an unconstitutional taking of property without payment of just compensation nor infringed upon other federally guaranteed rights. 477 U.S. at 81. The Court in *PruneYard* rejected the contention that any significant value of the shopping center owner's property right had been taken in preventing the exclusion of those who sought a limited right of access to express their

political views. The Court emphasized that the property involved was by its very nature "open to the public to come and go as they please" and that prohibiting the shopping center from excluding the plaintiffs would in no way interfere with the owner's use of the property as a shopping center. *Id.* at 82-85, 87.

In contrast, the admission of appellee and all other "similar" publishers to Leisure World would interfere substantially with Leisure World's character and purpose as a very private, secure development. In stark contrast to the PruneYard, whose very profitability depended upon drawing the public into the center, Leisure World is deeply rooted in the concept of excluding the uninvited guest and peddler.

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court acknowledged that a result such as that reached by the California court in this case would involve a taking of property:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

Id. at 567.[12] The California court has required just such an accommodation, and in so doing, it has appropriated ap-

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[12]In the instant case, appellee had and utilized an alternative avenue of distributing its publication via the United States Postal Service. (R.T., 6498, 6561.) Under *Hudgens v. NLRB*, 424 U.S. 507 (1976), however, the presence or absence of alternative means of communication is no longer determinative for constitutional First Amendment evaluation since a speaker has no federal constitutional right of access to private property.

pellant's property right to determine whom it will admit into Leisure World.[13]

If the right to control ingress is to be taken, compensation must be paid. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the United States attempted to require the owners of a private pond to allow public access under the federal "navigational servitude" when the pond became navigable as a result of the owners' development efforts. The owners, whose contracts with residents called for an annual membership fee entitling them to use the pond, argued that public access would defeat their investment-backed expectations and would result in a taking of their property right of excluding the general public. The Supreme Court agreed, stating:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Id. at 180.

The deprivation of appellant's property rights effected by the decision of the California court is no less substantial. Like that in *Kaiser Aetna*, the invasion is physical and involves a forced opening of private gates to strangers in a manner directly contrary to the very purpose of those gates. The holding of the California court thus constitutes a taking of appellant's property without payment of just compensation, contrary to the dictates of the federal Constitution.

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[13]Not only has the ruling of the California court resulted in a taking of property without compensation, it has also exposed the elderly residents of Leisure World to an unexpected and unprecedented potential liability of many millions of dollars.

Conclusion.

For the reasons set forth above, the Court should note probable jurisdiction of this appeal.

December 13, 1982.

Respectfully submitted,

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